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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR VENTURA et al., Defendants and Appellants.	B212206 (Los Angeles County Super. Ct. No. BA318142)

APPEAL from judgments of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Affirmed with directions.

Law Offices of John K. Fu and John Fu for Defendant and Appellant Victor Ventura.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant Ivan Cabrera.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendants Victor Ventura and Ivan Cabrera—admitted Barrio Mojados ("BMS" or "Wet Town") gang members—guilty of the murder of Ricardo Lizarraga. Efrain F. was with Lizarraga when he was shot. There were no other witnesses to the crime. Efrain F. spoke with police detectives and defense investigators and testified at the preliminary hearing. Once trial began, however, the prosecution could not locate him, and the trial court deemed Efrain F. unavailable to testify.

On appeal, both defendants argue the prosecution did not exercise due diligence in trying to locate Efrain F. for trial and, therefore, the court erred in permitting the use of Efrain F.'s preliminary hearing testimony at trial. They also claim the court erred in denying their motions for new trial based on Efrain F.'s reemergence after trial and willingness to testify. Finally, with respect to Efrain F., defendant Cabrera argues the court improperly restricted the jury's consideration of a defense investigator's videotaped interview of Efrain F. Defendant Ventura also argues the evidence was insufficient to support the verdict against him.

We are not persuaded by defendants' arguments and, therefore, affirm the judgments.[1]

Background

Ricardo Lizarraga was 15 years old when he was shot at close range in the face on February 14, 2007 in front of his south Los Angeles home on 46th Street. He died less than two days later. A nine-millimeter bullet casing was found at the scene and a bullet was recovered from Lizarraga's body.

1. The Investigation, Preliminary Hearing and Trial

a. Carlos Garcia

One week after the shooting, Carlos Garcia—a BMS gang member—was arrested for robbery. At the station following Garcia's arrest, Los Angeles Police Department Detectives Villa and Benavides questioned Garcia about Lizarraga's murder. Garcia told

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[1] Ventura also filed a petition for writ of habeas corpus, which we address in a separate order.

the detectives Ventura (also known as "Maniac") was involved in the shooting. Garcia told the detectives that Ventura drove a blue Tahoe and spoke to Garcia about the murder. According to Garcia's statement to the detectives, Ventura told Garcia "You heard what happened. We lit up a fool tramp on 46th. We lit him up good." From a group of photographs, Garcia identified Ventura as the person who said this to him.

b. Efrain F.

Twelve days after the shooting, on February 26, 2007, Detectives Villa and Benavides questioned 14-year-old Efrain F. as a possible witness to the crime. A portion of that interview (conducted at the police station) was recorded and played to the jury.

In that stationhouse interview, Efrain F. told the detectives he was with Lizarraga when he was shot and that he could identify the shooter and the driver of the car from which the shooter emerged. He explained he, Lizarraga and one other person (who the police never found) were walking toward Lizarraga's house when a grey Nissan with dark tinted windows pulled up alongside them and the three people in the car yelled out "Wet town, wet town" and made gang signs. The boys were scared and began walking fast, but Lizarraga decided to take his time. As the boys reached the front of Lizarraga's house, the same car returned and the occupants again yelled "Wet town, wet town." The person in the front passenger seat got out of the car, approached the boys and shot a gun at them, but did not hit anyone. Then, holding the gun about an inch from Lizarraga's face, he shot Lizarraga. The shooter ran back to the car, which sped away. Efrain F. ran from the scene and did not tell anyone about the shooting.

Efrain F. described both the driver of the Nissan and the shooter. From separate photographic lineups, Efrain F. identified Ventura as the driver and Cabrera as the shooter, although he said Cabrera's hair was shorter. He also told the detectives that, after the shooting, he saw the driver of the Nissan driving a blue Tahoe. After telling the detectives what had happened, Efrain F. explained that his brother was a member of the 38th Street gang. Efrain F. knew 38th Street and BMS, or Wet Town, were enemies.

At the end of the interview, Efrain F. asked "You're not going to tell nobody I told you all that though?" Detective Villa answered, "You let us worry about that."

Detective Benavides testified that, although Efrain F. appeared scared or traumatized about what had happened, he cooperated with the detectives during the stationhouse interview. During that interview, Detective Benavides did not tell Efrain F. that he (Benavides) already knew who committed the crime or who he thought might have committed the crime. The detective also said no one suggested to Efrain F. who he should choose from the photographic lineups. Nor did anyone pressure or threaten him. Detective Benavides said he was not hostile with Efrain F., nor did he tell Efrain F. he was being recorded.

Efrain F. also testified at the preliminary hearing held four months later on June 27 and 28, 2007. According to Detective Benavides, Efrain F. did not know he would be testifying at the hearing until the detective picked him up that day and drove him to court. At the hearing, Efrain F. was visibly frightened. He wore a hood over his head and would not face the defendants. He was nervous he might be shot. Nonetheless, Efrain F. testified and his story was consistent in many respects with what he had told the detectives a few months earlier. He said that, when the detectives interviewed him at the police station, they did not indicate that they knew who was involved in the murder or that they thought BMS was involved.

But, his description of the shooting differed in important respects as well. Efrain F. testified that, at first, he told the detectives that he had not seen the shooting at all, but had only heard gunshots. And, although he again identified Ventura as the driver of the Nissan and Cabrera as the shooter, as the preliminary hearing progressed, Efrain F. became less and less sure of his identifications. The more he thought about it, the less sure he was.

At the end of the first day of the preliminary hearing, the trial judge ordered Efrain F. to return the following day. The court was confident that Efrain F. would return and stated that, "even though he might be nervous about this, it will be worse for him not to come back than it would be if he came back, since you've already been here today." The court also cautioned family members who were in court that day not to contact Efrain F.

and to "keep this nice and clean." Detective Benavides drove Efrain F. to court for the second day of the hearing as well.

c. Trial

At trial, Detective Villa testified that, during a search of Ventura's home, detectives found, among other things, a blue Chevrolet Tahoe, a silver Nissan Altima, and nine-millimeter bullets (a different brand than the nine-millimeter casing found at the crime scene). Ventura was home at the time of the search and acted belligerently toward the officers. Detectives also searched Cabrera's home and found, among other things, a small photo album containing pictures of people (including the defendants) flashing gang signs.

Two police officers testified that they each had previously stopped Ventura, who had admitted to them that he was a BMS gang member. One officer testified that, in November 2006, he spoke with Ventura and three others in an alley about two blocks from the scene of the February 14 shooting. At the time, Ventura was sitting in the driver's seat of a silver Nissan Altima, which was stopped in the alley. Ventura admitted to the officer that he was a BMS gang member. The other officer testified he had stopped Ventura in April 2006 in the same general vicinity. Again, on that occasion, Ventura admitted to being a BMS member and, at the time, was driving a grey Nissan Altima.

Similarly, an officer testified that, on two separate occasions in early 2005, in the same general area as the shooting, he stopped Cabrera and others. Cabrera and the others were admitted BMS gang members. Another officer testified that, in February 2005, he also spoke with Cabrera in the same general area and Cabrera admitted being a BMS gang member.

A gang expert also testified. The expert explained BMS had approximately 140 documented members, whose primary activities included, among other crimes, murder. He also discussed the long-standing and violent rivalry between BMS and the 38th Street gang. According to the expert, a "snitch" is someone who truthfully reports a crime—something gang members seriously disapprove.

The expert said both Ventura and Cabrera, as well as Carlos Garcia, were BMS members. He also stated that, when he encountered Efrain F. in October 2007, Efrain F. admitted being a member of the 38th Street gang and that Efrain F. has a tattoo on his chest indicating his gang membership.[2] Efrain F.'s brother is also a 38th Street member. Based on a hypothetical derived from the facts of this case, the expert opined Lizarraga's murder was done for the benefit of, and in association with, the BMS gang.

Carlos Garcia was brought from prison to testify. He identified Ventura as a BMS member known as "Maniac" and Cabrera as a BMS member known as "Chato." He also said, however, that he knew nothing about the murder and that his earlier statement to Detectives Villa and Benavides was not true. Garcia explained that he lied to the detectives because he was scared and felt pressured. He said the detectives told him that, if he did not help them, they could not help him (although he was not sure what they meant by "helping him"). The detectives did not tell Garcia that BMS was involved in the murder or that the victim had been shot. Garcia said Ventura's name simply came to his mind and he "assumed" the victim had been shot. Detective Benavides testified that he and his partner did not threaten or pressure Garcia or make false promises. Garcia also explained that a "snitch" is a person who tells on someone else and that snitches get killed. He also knew 38th Street had rivals besides BMS.

At trial, the court found Efrain F. unavailable and his preliminary hearing testimony was read to the jury.

d. Defense Evidence

Cabrera called defense investigator Leticia Macias, who had met with Efrain F. three times. She first spoke with Efrain F. on the front porch of his home on June 9, 2007. Efrain F. told her that on the night of the shooting, while he and his friends were walking down the street, a grey Nissan with two people in it stopped next to them. The

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[2] Out of the presence of the jury, Detective Villa stated that, at the time of the shooting, he did not believe Efrain F. was an active member of the 38th Street gang. At some point after the shooting, however, Efrain F. became an active member of the gang and got a large "38" tattoo on his chest.

passenger was "talking shit" and asked where they were from. After that car left, a blue Nissan with tinted windows stopped next to them and the passenger of that car was also "talking shit" and asked what gang they belonged to. In response, Lizarraga said "I don't give a fuck." Efrain F. said he heard four or five shots. He did not hear any gang references, did not see the driver of the car, did not get a good look at the shooter (although he was able to describe him generally), did not see the shooter shoot Lizarraga, and did not see the car drive away because he was hiding behind a white van. He could not identify anyone.

Efrain F. told Macias that he wanted to correct some of the statements he gave to the police because, although they were very nice and did not try to influence what he said, they misunderstood him. He said that, when he told the police he could not identify anyone, the police told him BMS was involved. When he identified defendants from the photographic line-ups, he was only pointing to people whose skin color was similar to that of the shooter. He was not identifying them as the driver or shooter. He also said the shooter was eight to fifteen feet away from Lizarraga when he was shot. Efrain F. did not know Lizarraga had been shot in the face until the detectives told him.

Macias spoke with Efrain F. again a few weeks later (the day before the preliminary hearing) on a bench outside an administrative office at his school. In that conversation, Macias told Efrain F. that Detectives Villa and Benavides had recorded a portion of his stationhouse interview and she read the transcript of that recording to him. That was the first time Efrain F. had heard his stationhouse interview had been recorded and he seemed surprised.

He told Macias that the detectives had questioned him for seven to eight hours and that he had told them the shooter was in the blue car, not the grey one. He again said that, because he was hiding behind a white van, he did not see Lizarraga get shot, but only heard the gun. Although he told the detectives he could not identify anyone, they insisted he knew who shot Lizarraga and told him they already knew BMS was involved. The detectives pressured and confused him and made him feel dumb so he decided to agree with them and to identify the people they obviously wanted him to identify.

Although he could not articulate it exactly, he was afraid he would get in trouble if he did not tell the detectives what they wanted to hear.

In August 2007, after the preliminary hearing, Macias again met with Efrain F. at his home. At that time, Efrain F. discussed his testimony at the preliminary hearing. He explained that, while testifying, he was extremely nervous and, generally, is scared and nervous around police. In court, he said what he thought the police wanted him to say. He said he was not notified about the preliminary hearing. The detectives came to his school, picked him up and took him to court.

Later, Cabrera's counsel hired another investigator, Darryl Carlson, who spoke with Efrain F. twice—once in February 2008 at Efrain F.'s home, and again in March 2008 at Efrain F.'s school. The investigator made an audio recording of the interview at Efrain F.'s home and a video recording of the interview at school. Portions of the March 2008 videotaped interview were played for the jury. In that interview, Efrain F. denied seeing anyone in the car on the night of the shooting or hearing anything they said as they drove by. He explained he was worried that the people in the car might consider it a challenge if he looked at them so he purposely did not look at them. Efrain F. said he told the police what he thought they wanted to hear because he felt scared and pressured and wanted to leave. He said one of the detectives kept banging his fist on the table, yelling at him and insisting Efrain F. knew who shot Lizarraga. He explained that, because the stationhouse interview had been recorded, he was scared he would get in trouble if, at the preliminary hearing, he did not tell the same story. During the March 2008 interview, Efrain F. was visibly upset when recounting his discussions with the police.

Ventura did not present evidence on his behalf.

2. Verdict and Sentencing

The jury found defendants guilty of murder and found true the gang and weapon allegations. The trial court denied probation and sentenced both defendants to 40 years to life in state prison.

Appellants each appealed.

Discussion

1. Due Diligence in Locating Efrain F.

Defendants argue the trial court erred in finding due diligence and allowing the prosecution to read Efrain F.'s preliminary hearing testimony to the jury. We disagree.

Although the federal and state Constitutions guarantee a criminal defendant the right to confront witnesses against him or her, that right is not absolute. (*People v. Bunyard* (2009) 45 Cal.4th 836, 848-849 (*Bunyard*).) Testimony given in a preliminary hearing against the same defendant may be used at trial if the witness is unavailable at trial. (Evid. Code, § 1291.) A witness is unavailable if he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) Although section 240 refers to "reasonable diligence," courts often describe the analysis as one involving "due diligence." (*Bunyard, supra,* 45 Cal.4th at p. 849.)

We independently review the trial court's determination of due diligence. (*People v. Cromer* (2001) 24 Cal.4th 889, 901 (*Cromer*).) To determine whether a party has exercised due diligence to produce a witness at trial, we review the facts of the individual case and consider "'such matters as whether [the proponent] reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available [citation], whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised [citation].' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

"An appellate court 'will not reverse a trial court's determination [under section 240] simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals, . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually . . . with the benefit of hindsight) does not automatically render the prosecution's efforts "unreasonable." [Citations.] The law requires only reasonable

efforts, not prescient perfection.' [Citation.] 'That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [there was due diligence]. . . . It is enough that the People used reasonable efforts to locate the witness.' [Citation.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706 (*Diaz*).)

a. Evidence of due diligence

On Monday August 11, 2008, the first day of testimony, the prosecutor requested a due diligence hearing with respect to the prosecution's attempts to locate Efrain F. The prosecutor explained that the case "would be unable to proceed" without Efrain F.'s testimony. The court held a due diligence hearing the following day.

At the hearing, Detective Villa said that, when he first interviewed Efrain F. at the stationhouse in February 2007, Efrain F. was scared. Detective Villa also said Efrain F. was scared to testify. Following the preliminary hearing, Detective Villa kept tabs on Efrain F. and spoke with another officer who had contacted Efrain F. in January, March, May and July 2008.

On Thursday August 7, 2008, after jury selection began, but before a jury was selected, Detective Villa went to Efrain F.'s home to confirm he was still there. A female who claimed to be Efrain F.'s cousin told the detective that Efrain F. still lived there but was at school. Although the detective planned to return on Monday morning to bring Efrain F. to testify at trial, the detective did not want the cousin, or Efrain F., to know this for fear Efrain F. would disappear. Thus, Detective Villa told the cousin that, because Efrain F. was a juvenile, the detectives were required to check in on him and make sure he was okay and staying in school.

Detective Villa returned to the home four days later, on Monday August 11, 2008, to pick up Efrain F. for trial. But, Efrain F. was not there. Efrain F.'s mother told the detective Efrain F. had not been home since the previous Wednesday, when police had been called to the home. She also told the detective that Efrain F. thought he might have to testify at trial, became frightened, and fled. Detective Villa searched the home, but did not find Efrain F. The detective then determined where Efrain F. went to school and searched for him there. He was told Efrain F. had not been to school since the

Wednesday before. The detective also alerted other officers in the area to keep a look out for Efrain F. and he and his partner unsuccessfully searched for Efrain F. at his known hangouts. Detective Villa returned to Efrain F.'s home on Tuesday August 12, 2008 (the day of the due diligence hearing), but Efrain F. still was not there. In his efforts to locate Efrain F., Detective Villa also checked, without success, local jails and the coroner's office, as well as local hospitals, which would not release patient information over the phone.

Detective Villa explained that, in his experience, it is best to subpoena a witness to a gang-related crime—such as Efrain F.—on the day of trial. According to Detective Villa, such witnesses are often frightened to testify against a gang or its members. In particular, Detective Villa explained that "[v]ery seldom do trials begin on the specified date on subpoenas. When I get a firm date that a jury has been picked or close to being picked and that for sure court is going to begin on a specific day, I will on that day of court pick up my witnesses. [¶] Q: So you are saying it's your custom and practice to not issue subpoenas? Merely to go to the location and pick up witnesses and bring them to court the day their testimony is required? [¶] A: Especially in gang murder cases. [¶] Q: That's your custom and practice? [¶] A: Most of the time, yes." This was the strategy for Efrain F. In the detective's opinion, had Efrain F. been subpoenaed a week or days before trial, he "would have been gone."

Efrain F.'s mother also testified at the due diligence hearing. She said that, on the prior Tuesday (August 5, 2008), there had been "a problem at home" and her daughter-in-law had called police. As a result, Efrain F. left home and had not been back since. She did not know where he was and she was worried. She said Efrain F. is afraid of the police. She also said detectives had been to her home the day before she testified and the day she testified.

Crystal, a 16-year-old-girl living at the same house with Efrain F., also testified. She said that, when Detective Villa came by the house on Thursday August 7, 2008, she did not tell him the truth. Although she knew Efrain F. was not at school and things were not okay, she told Detective Villa that Efrain F. was at school, everything was fine, and

Efrain F. still lived at the house. She also told the detective she was Efrain F.'s cousin, even though she is not. Crystal explained that she did not know who Detective Villa was and that he did not identify himself as a police officer or detective, but only said his name was Villa. He was wearing a suit and drove an unmarked car. She could not remember if he showed his badge or carried a gun. After speaking with the detective, Crystal spoke with Efrain F. on the phone and told him that "Villa" had come by the house looking for him.

Other than speaking with Detective Villa on August 7, Crystal remembered seeing the detective at their house only once before, one or two months earlier. She never saw him try to give a piece of paper to Efrain F. or Efrain F.'s mother and he did not talk about Efrain F. coming to court. Crystal said Efrain F. runs every time he sees the police, wants nothing to do with them or the court system, and never leaves the house. She also stated Efrain F. had not stayed at the house for two or three weeks.

Raquel, another occupant of the house where Efrain F. lived, also testified. She said Efrain F. mostly stays in the house, but had not been there for a little more than two weeks. In the past month, she had not seen anyone come to the house with a piece of paper for Efrain F. or his mother. Raquel was uncertain about when police were called to the house and when detectives came looking for Efrain F.

Finally, Mr. Carlson, Cabrera's private investigator, testified at the due diligence hearing. On the evening of Monday August 11, 2008 (the first day of testimony), the investigator visited Efrain F.'s home and served subpoenas on Efrain F.'s mother and other occupants of the house. At that time, no one knew where Efrain F. was and his mother was worried. They told the investigator that Efrain F. had left the week before after "some sort of family dispute." They also told him that Efrain F. is very afraid of the police. In the investigator's opinion, Efrain F. was traumatized by his experience with Detectives Benavides and Villa in this case and was eager to testify at trial to "clear things up and tell the truth."

b. *Diaz* and *Avila*

In finding due diligence, the trial court considered in detail two cases from this district: *Diaz, supra*, 95 Cal.App.4th 695 and *People v. Avila* (2005) 131 Cal.App.4th 163 (*Avila*). The two cases are not in conflict. Rather, as the *Avila* court explained, the two cases are factually different. The trial court concluded this case was more akin to *Diaz*. We agree.

In *Diaz*, a material witness to a gang murder told police officers that she was unwilling to testify at the preliminary hearing. (*Diaz, supra*, 95 Cal.App.4th at p. 707.) To secure her presence at the hearing, the police falsely told her they were taking her to the police station for an interview, and then drove her to the courthouse. (*Ibid.*) Following the hearing, the officers monitored the witness's location on a weekly basis, and waited until the day of trial to serve a subpoena on her. (*Ibid.*) According to one of the officers, this tactic was necessary because serving the subpoena earlier was likely to have ensured the witness's unavailability. (*Ibid.*) When the officers arrived at her residence, they found that she had disappeared, and their efforts to locate her were unsuccessful. (*Id.* at pp. 706-707.) The appellate court concluded that the officers' efforts to secure the witness's presence were reasonable in light of her "'calculated effort to avoid service of process.'" (*Id.* at p. 707.)

Presented with a different factual scenario, the *Avila* court reversed the trial court's finding of due diligence. In *Avila*, a witness to a gang-related assault testified at the defendant's first trial, and was apparently fearless and cooperative. (*Avila*, *supra*, 131 Cal.App.4th at pp. 167-169.) After the first trial ended in a mistrial, the prosecution waited until the first day of the retrial (three months later) to contact the witness about testifying, and was unsuccessful in locating her. (*Id.* at p. 169.) A detective testified he had waited until the morning of the retrial to serve the witness because he feared she would flee if given time to ponder the implications of testifying in a gang-related case. (*Ibid.*) The detective also contradictorily claimed he had been confident of his ability to locate her on the shortest possible notice and had not anticipated that she would move from her apartment. (*Id.* at pp. 169-170.) The appellate court reversed the trial court's

finding of due diligence, explaining that "[w]aiting until the morning a trial begins to try to locate a witness after being out of touch for several months is generally not prudent or reasonable, and certainly is not an untiring effort to secure a witness's presence at trial." (*Id.* at p. 169.)

c. Application

This is not a case where, for months leading up to trial, the location of a witness was unknown and no one did anything to find the witness until after trial started. To the contrary, although detectives did not make daily or even weekly contact with Efrain F., they were keeping tabs on him for months before trial and knew where he was.

In addition, upon learning jury selection had begun, Detective Villa went to Efrain F.'s home to confirm he was still living there. The detective was told Efrain F. was still there and everything was fine. Thus, as of the Thursday before testimony began, the prosecution reasonably believed Efrain F. was available. It was not until Detective Villa went to pick him up on Monday that he discovered Efrain F. had been missing since the week before. Once Detective Villa realized Efrain F. had fled, the detective took reasonable—although ultimately unsuccessful—steps to find Efrain F.

Here, the prosecution and detectives walked a fine line. As almost everyone agreed, Efrain F. was scared of the police and testifying, and generally stayed close to home. Thus, on the one hand, the detectives had to be diligent in keeping tabs on Efrain F.'s whereabouts. On the other hand, they had to be careful not to scare him away. That is not an easy line to walk and, in fact, the detectives appeared to be doing a good job. Until the week of trial, Efrain F. had not gone into hiding and the detectives knew where to locate him. Accordingly, under the circumstances of this case, we conclude the prosecution demonstrated its due diligence and the trial court did not err in permitting the use of Efrain F.'s preliminary hearing testimony. (See *Diaz*, *supra*, 95 Cal.App.4th at pp. 706-707.)

2. Motions for New Trial

Defendants also argue the trial court erred in denying their motions for new trial based on Efrain F.'s reemergence and willingness to testify. In particular, defendants

claimed Efrain F. would testify that he could not identify the shooter or driver and would have explained why he lied to the police and defense investigator Macias.

To obtain a new trial on the ground of newly discovered evidence, the defendant must show (i) the evidence is newly discovered, (ii) the evidence is not merely cumulative, (iii) the evidence is such as to render a different result probable on a retrial of the case, (iv) the party could not with reasonable diligence have discovered and produced the evidence at trial, and (v) these facts are shown by the best evidence of which the case admits. (*People v. Dyer* (1988) 45 Cal.3d 26, 50.) The granting or denying of a new trial on the ground of newly discovered evidence is a matter within the sound discretion of the trial court; each case must be judged from its own factual background; and the trial court's ruling will not be disturbed on appeal except for an abuse of discretion. (*Id.* at pp. 50, 52.)

As the trial court correctly concluded, the proffered "newly discovered" evidence was not new and would not have made a different result probable. Everyone, including the jury, knew Efrain F. changed his story during the course of the murder investigation and heard his many different accounts of the shooting. Similarly, everyone, including the jury, knew Efrain F. claimed he was pressured by the police to identify BMS members Cabrera and Ventura and was scared to change his statement to the police, even though he eventually did.

We are not persuaded by Cabrera's argument that, while the content of Efrain F.'s testimony is not new, his presence in court was the new evidence for purposes of the motion for new trial. As with the content of Efrain F.'s proffered "new" testimony, the court and jury saw Efrain F.'s demeanor during his interview with investigator Carlson. Efrain F. was visibly and obviously upset when discussing his dealings with the police. In addition, although not personally seen by the court or jury, Efrain F.'s demeanor at the preliminary hearing was made clear on the record. Efrain F. was scared.

Similarly, because the evidence was not new and a different result was not probable, we are not persuaded by Cabrera's argument that denial of a new trial resulted in a miscarriage of justice.

Accordingly, we conclude the trial court did not abuse its discretion in denying defendants' motions for new trial.

3. Defendant Cabrera's Remaining Arguments

a. Use of Videotaped Statements

The trial court ruled that Efrain F.'s statements in the videotaped interview could be used for impeachment purposes only. Consistent with its ruling, the trial court gave the following limiting instruction: "Efrain [F.] did not testify in this trial, but his testimony, taken at another time, was read for you. In addition to this testimony, you will hear and have heard evidence that Efrain [F.] made other statements. If you conclude that Efrain [F.] made those other statements, you may only consider them in a limited way. You may only use them in deciding whether to believe the testimony of Efrain [F.] that was read here in trial. You may not use those other statements as proof that the information contained in them is true, nor may you use them for any other reason."

On appeal, Cabrera argues the trial court erred in not permitting the jury to consider Efrain F.'s videotaped statements for their truth under either Evidence Code section 1235 or Evidence Code section 770's "interests of justice" exception.[3] We agree with respondent that, because Cabrera did not raise these arguments below, they have been waived.

In considering the videotaped interview, the trial court ruled that portions of the video could come in under Evidence Code section 1202 and that it was "clear it can only

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[3] Section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (Evid. Code, § 1235.)

Section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." (Evid. Code, § 770.)

go to attacking credibility."[4] Counsel for Cabrera consistently agreed. For example, he stated "[t]hose out-of-court statements by Efrain, all parties agree and the jury will be so instructed, are for impeachment of his former testimony and solely for impeachment of his former testimony." Similarly, he reiterated "[t]he purpose of the statements is impeachment and only impeachment. It will only ever be impeachment."

Although Cabrera claims he raised the issue below, the record does not support that position. In particular, Cabrera points to his trial counsel's argument that he should be permitted to use physical evidence (i.e., photographs of the crime scene showing a white van) to bolster Efrain F.'s out-of-court statements that he took cover behind a white van. In essence, Cabrera's trial counsel wanted to enhance the probative value of Efrain F.'s out-of-court statements so that the jury would give those statements as much weight as possible for purposes of impeachment. He sought to do this by pointing to physical evidence "corroborating" the statements. This does not support Cabrera's position here that he sought to admit Efrain F.'s videotaped statements for their truth.

Accordingly, because it was not raised below, we conclude Cabrera has waived his argument with respect to the proper use of Efrain F.'s videotaped statements. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Fauber* (1992) 2 Cal.4th 792, 854.) In any event, assuming Cabrera had raised the issue below,[5] the trial court did not abuse its

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[4] Section 1202 provides in relevant part: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing." (Evid. Code, § 1202.)

[5] Ventura's trial counsel raised the "interests of justice" exception to Evidence Code section 770, which permits the trial court in the interests of justice to admit inconsistent statements "even though the witness has been excused and has had no opportunity to explain or deny the statement." (Evid. Code, § 770, Law Revision Com. com.) Cabrera's counsel followed up on that argument, but only with respect to Efrain F.'s statements to defense investigator Macias, which were made prior to the preliminary

discretion in refusing to permit admission of the videotaped statements for their truth. (*People v. Waidla*, *supra*, 22 Cal.4th 690 at p. 717 ["an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence"].)

b. Cumulative Error

Because we conclude the trial court did not err in its rulings on (a) due diligence, (b) motions for new trial, or (c) use of Efrain F.'s videotaped statements, Cabrera's argument with respect to a cumulative effect of the alleged errors is moot.

4. Defendant Ventura's Remaining Arguments

a. Sufficiency of the evidence generally

Ventura argues the evidence was insufficient to support his conviction. In particular, Ventura claims that, because both Efrain F. and Garcia recanted their initial statements to the police, their "testimonies were doubtful at best" and, therefore, "could not support a conviction beyond a reasonable doubt." In essence, Ventura invites this court to reweigh the evidence. But, because it is unquestionably the role of the jury (and not the court of appeal) to decide who is telling the truth and which version of events to believe, we decline his invitation. (See *People v. Casey* (1926) 79 Cal.App. 295, 298-299.)

b. Sufficiency of the evidence of aiding and abetting

Ventura also argues the evidence was insufficient to support a finding that he aided and abetted Cabrera in the murder. Ventura claims there is no evidence he knew Cabrera had a gun and would use it to kill Lizarraga. At most, Ventura asserts he could be found liable as a "conspirator after the fact and be liable for the escape."

In reviewing the sufficiency of the evidence, we presume in support of the judgment every fact the jury could reasonably deduce from the evidence. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) "'[A]ll intendments are in favor of the judgment

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hearing (and not with respect to Efrain F.'s videotaped statements—which are at issue here—made after the preliminary hearing).

and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it.'" (*People v. Moore* (1953) 120 Cal.App.2d 303, 306.) We may determine there is no substantial evidence in support of conviction only if it can be said that, on the evidence presented, no reasonable fact finder could find defendant guilty. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408.)

A person is guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it. (Pen. Code, § 31.) The jury was correctly instructed that, to be found guilty as an aider and abettor, the prosecution must prove "1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." (See *People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Aiding and abetting may be shown by circumstantial evidence such as presence at the crime scene, companionship with the perpetrator, and conduct before and after the offense. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) While presence at the crime scene alone is not sufficient to support a finding of aiding and abetting, it is one factor to consider. (*People v. Campbell*, *supra*, 25 Cal.App.4th at p. 409.) Another factor is the defendant's failure to take steps to prevent the commission of the crime. (*People v. Jones* (1980) 108 Cal.App.3d 9, 15.) An aider and abettor need not actually assist in the commission of the crime. (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1256.)

We conclude substantial evidence supports a finding that Ventura aided and abetted in the murder. Although conflicting accounts were presented, there was evidence putting Ventura behind the wheel of the car that twice drove up to Lizarraga and Efrain F., and from which Ventura and Cabrera called out gang names and the shooter emerged. There was also evidence of both Ventura's and Cabrera's association with the BMS gang and that gang's rivalry with the 38th Street gang, in whose territory the murder occurred.

The gang expert explained that gang members may commit shootings in an effort to expand their territory. There was also testimony that Ventura boasted about the murder, saying "*We* lit up a fool tramp on 46th. *We* lit him up good." (Italics added.)

Ventura was not merely present at the scene of the murder independently being committed by Cabrera. Ventura's companionship and conduct before and after the murder, including his statement to Garcia, are substantial evidence of Ventura's aiding and abetting Cabrera.

c. Arguments raised in petition for writ of habeas corpus

At the end of his opening brief on appeal, Ventura refers to an ineffective assistance of counsel claim and a *Brady* violation claim, both of which he raises in a separately-filed petition for writ of habeas corpus (Case No. B217136). We do not address those arguments here, but instead will address them when we consider his writ petition.

5. Abstracts of Judgment

As Cabrera and respondent correctly agree, the abstracts of judgment for both defendants incorrectly state defendants were convicted of first degree murder. The abstracts for both defendants must be corrected so that they accurately reflect defendants' convictions for second degree murder.

Although not raised by the parties, the abstracts of judgment also do not reflect the Penal Code section 186.22 ("section 186.22") allegation, which the jury found true as to each defendant. At the sentencing hearing, the trial court stated that section "186.22(b)(1) is imposed by operation of law pursuant to Penal Code section 186.22(b)(5)." The abstracts of judgment must be corrected so that they accurately reflect the jury's true finding on the section 186.22 allegations.

Disposition

The judgments are affirmed.

The trial court is directed to amend the abstracts of judgment so that they reflect the defendants' convictions for second degree murder and the jury's true finding on the Penal Code section 186.22 allegations. The trial court is directed to forward the amended abstracts to the appropriate authorities.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.